

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION THREE

A.S.,

Petitioner,

v.

THE SUPERIOR COURT OF SAN
MATEO COUNTY,

Respondent;

SAN MATEO COUNTY HUMAN
SERVICES AGENCY,

Real Party in Interest.

A155283

(San Mateo County
Super. Ct. No. 18JD0666/18JD0667)

Mother, A.S., has petitioned for an extraordinary writ. She seeks an order directing the superior court to vacate its rulings on a supplemental dependency petition that removed her twin children from her care and custody and set a hearing for a permanent plan pursuant to Welfare and Institutions Code section 366.26. The superior court's findings were supported by substantial evidence that the allegations of the petition were true, that its previous disposition did not effectively protect the children and that there would be a substantial danger to the children if they were returned to Mother's care. The court was also correct to find that Mother had exhausted the time limit for the provision of family reunification services. We deny the petition.

BACKGROUND

The twins, a boy and a girl now age three, were removed from their Mother's care in August 2016, and adjudicated dependents of the juvenile court on September 13, 2016.

They were placed in foster care with their maternal grandparents.¹ The facts supporting the petition arose from an incident when Mother sought treatment for eye pain at a hospital emergency room. She had the twins with her, smelled of alcohol, and was disheveled and agitated. The police were called because Mother appeared to be intoxicated while caring for her children. The twins were declared wards of the court under California Welfare and Institutions Code section 300 subdivisions (b) and (g) due to Mother's inability to provide regular care for them due to her mental illness and substance abuse.²

The children were in foster care for twenty months while Mother was provided reunification services that included substance abuse treatment, drug and alcohol testing, individual therapy, dyad therapy with the children, supervised visitation and parenting education. On April 20, 2018, the children were returned to Mother's care under a transitional plan with family maintenance services. One of the requirements of Mother's plan was that she refrain from consuming alcohol, and she was to seek help if she could not do so. This requirement was explained to Mother when the plan was approved.

During the transition period, the children generally were in Mother's home each week from Friday afternoon until Tuesday morning, and were with their maternal grandmother from Tuesday until Friday. In July 2018, Mother had four positive tests for alcohol consumption. As a result, the San Mateo County Human Services Agency (Agency) filed a supplemental juvenile dependency petition alleging that the transition plan had been ineffective because the children remained at risk due to Mother's inability to maintain her sobriety while they were in her care. On August 9, 2018, the children were once again detained and placed with their maternal grandmother.

¹ The twins' father is deceased. He passed away on May 21, 2018.

² Unless stated otherwise, all statutory references are to the California Welfare and Institutions Code.

1. The Detention Hearing

Mother contested the basis for the court's jurisdiction under the supplemental petition, arguing there was no evidence the children were at any risk of harm. The maternal grandmother (Grandmother) testified.

In April when the children were returned to Mother, Grandmother understood Mother was not to drink alcohol. Grandmother did not initially support return of the children to Mother's care, but after four months in her custody for a few days a week, Grandmother had no concerns for the children's safety. While Grandmother was concerned about Mother's recent positive test for alcohol consumption, she never suspected Mother of drinking when the children were with her.

Grandmother also testified about a July 2018 incident when Mother called her from Redwood City with the children. Mother was extremely agitated and frantic, and looking to get a ride home from Redwood City. Grandmother became concerned and called the social worker to inform her about the situation. In retrospect, Grandmother felt she over-reacted because Mother called her father shortly thereafter to report that she was at home.

Mother's therapists also testified. Both testified to Mother's progress over 6 months to a year before the hearing. Neither had ever seen Mother under the influence of alcohol, nor did they have concerns for the children's safety or well-being when they were with Mother.

Finally, Mother's assigned caseworker testified. A previous caseworker told Mother in April 2018 that she was not to drink alcohol, and Mother's case plan required testing for alcohol and controlled substances as a way to address her substance abuse. Mother says she was once told by a social worker in 2016 that she only need refrain from drinking alcohol when she was around the children, and not at other times. But Mother's case plan is clear that she is to refrain from alcohol consumption at all times. Her drinking is an ongoing concern. It jeopardizes the children's physical safety and emotional well-being.

Since the dependency case began, Mother had received substance abuse treatment, alcohol and drug testing, dyad therapy, individual therapy, parenting education, supervised visits and transportation services. On August 1, Mother told the case worker that she was going to enroll in an outpatient treatment program for her alcohol addiction to begin on August 6. But Mother never completed her enrollment. There are no other services that could be provided Mother that would prevent the detention of her children.

When the caseworker met with Mother to discuss her positive tests for alcohol, she thought Mother could benefit from inpatient treatment. But Mother denied that she had anything more to drink than one beer during the month of July and said that her positive results could also have been due to an oral rinse prescribed by her dentist. Mother's explanation did not seem correct to the caseworker because the results of her testing revealed much more alcohol consumption than one beer or use of an oral rinse. For these reasons, the case worker believed the children should be removed from Mother's custody and placed with Grandmother.

At the conclusion of the hearing, the court ordered the children detained after finding that Mother's continued drinking put them at risk and there was no alternative means to protect their safety. In making its findings, the court rejected Mother's suggestion that she could safely care for the children in a residential alcohol treatment program, because Mother was not at that time enrolled in such a program.

2. The Jurisdictional Hearing.

The parties stipulated at the beginning of the jurisdictional hearing that the testimony taken at the detention hearing could be considered by the court in deciding jurisdictional issues. The first witness was the Agency social worker who prepared the addendum report for the jurisdiction hearing.

The report contains a list of the times between August 2016 and August 2018 when Mother was told not to drink, questioned about positive test results or encouraged to seek substance abuse treatment. The social worker also spoke with the admissions director and the care coordinator at the Women's Recovery Association (WRA) where Mother was enrolled in a 30-day inpatient treatment program.

The care coordinator thought Mother was in denial of her addiction to alcohol. Although Mother was enrolled in the program for 30 days, she could approach the staff and request the program be extended. Mother never gave the program coordinator or the social worker any indication she wanted to extend her program beyond 30 days. While the WRA staff would normally recommend such an extension, Mother's denial made the care coordinator question whether she was ready to benefit from an extended program. Once Mother reaches her 30 days, the treatment team will discuss a possible extension with Mother unless it is unnecessary because the court orders her treatment to continue.

There was also an incident at WRA shortly before the hearing when Mother returned to the facility from a community outing and staff found a baggie with a controlled substance in her purse and one pill in her pocket. While the substance appeared to be an amphetamine Mother takes by prescription, her WRA case coordinator was concerned that Mother was bringing an uncontrolled quantity of amphetamine into the facility. She was also concerned that given Mother's prescription to take two pills a day, she was able to save up 20 pills.

Finally, the social worker testified that Mother's positive test for alcohol on July 5 was administered at 10:30 in the morning. Mother had dropped the twins off at camp just 45 minutes before, and her test was positive for ethanol, indicating that she consumed alcohol within the previous 12 hours.

Mother's case coordinator at WRA also testified. She described that Mother was in the pre-contemplation phase of her substance abuse treatment. Addicts in the pre-contemplation phase are just beginning to realize that their substance abuse has a negative impact on their lives. Since the end of her first week in the WRA program, Mother was attending all the group therapy she could in light of her other obligations. But, while Mother told her case coordinator that her children were taken from her due to her drinking, she has never acknowledged her alcohol addiction.

Mother also testified. She voluntarily enrolled in WRA in mid-August, a few weeks before the jurisdictional hearing. She believes the peer support system and the program have helped with her mental health and helped her identify triggers for

substance use. While Mother admits she has a problem with her use of alcohol, she is unsure whether she is an alcoholic.

Mother was aware that her case plan required her to be tested for alcohol and drug use. But she was not told she had to refrain from alcohol, only that she could not drink around her kids. Nor was she ever told by a social worker that she should seek substance abuse treatment.

Mother has been taking medication for ADHD since she was first diagnosed in 2005, and it was provided to her at WRA. A baggie of pills was found in her belongings when she returned to WRA from court one day in August. Mother does not know when or how the pills got into her backpack. The same backpack had been previously searched at WRA, and the pills were not found. But they could have been in her backpack for months.

Mother did not drink alcohol on July 5, and she asked that her sample from that test be re-evaluated because she previously had positive tests re-evaluated and they came back negative. But she did relapse and drink alcohol on several occasions during the month of July, and she took “full responsibility for relapsing and making a mistake.” Mother does not deny that she has an alcohol problem. She would not have enrolled at WRA and done everything she has if she were in denial. Mother cannot recall when she realized she has a problem with alcohol. It has been a cumulative, ongoing realization. Mother does not agree that she is in the pre-contemplative stage of recovery. She has progressed beyond that. If her kids are returned to her, with her supportive family, she could rise to the occasion and properly care for them.

Mother thought her substance abuse tests were to check for her possible consumption of illegal substances or to make sure she was taking her medication. She knew testing positive for alcohol would look bad, but in 2016 she was told that since it was not illegal, nothing could be done about it. Although Mother signed her case plan, she did not read it and never asked any of the social workers about its details until July 2018 when she was told she is to abstain from alcohol. In more than 24 meetings with social workers between 2016 and 2018, Mother was never told she had to abstain from

alcohol. The most that was said about her drinking was that she could not drink around her children.

When Mother was in court in April 2018, she was told she was out of time for services and that she was being given her last chance to demonstrate she was ready to have her children returned.

The court expressly found Mother's testimony was not credible, and that the Agency met its burden by clear and convincing evidence. There would be a substantial danger to the children's health or safety if they were returned to Mother's custody, and there was no reasonable means to protect them but removal from Mother's home. The Agency complied with the case plan and provided Mother reasonable services. Mother exhausted the statutory time limit for services but made only minimal progress toward alleviating the reasons for the children's detention.

The children were ordered to remain in their grandmother's custody, Mother was to be provided two visits per week with possibly more as determined by the Agency, and the matter was set for a hearing to decide upon a permanent plan.

Mother petitioned this court for extraordinary relief and requested that we stay the proceedings in the juvenile court pending our decision on her petition. On October 19, 2018, we stayed further proceedings in the juvenile court pending our further order.

DISCUSSION

Mother's petition argues that the juvenile court erred in sustaining the allegations of the petition and in setting the case for a hearing on a permanent plan. She says the Agency did not meet its burden of proof to show the children were in substantial danger in Mother's custody or that placement in her home would be contrary to their welfare. She also claims there was no evidence from which the court could conclude the children faced a substantial risk of harm while in Mother's care that would justify termination of her parental rights.

Our review of a challenge to the sufficiency of the evidence is guided by familiar principles. "In juvenile cases, as in other areas of the law, the power of an appellate court asked to assess the sufficiency of the evidence begins and ends with a determination as to

whether or not there is any substantial evidence, whether or not contradicted, which will support the conclusion of the trier of fact.” (*In re Katrina C.* (1988) 201 Cal.App.3d 540, 547.) All conflicts must be resolved in favor of the respondent and all legitimate inferences must be indulged in support of the juvenile court’s findings. (*Ibid.*) The party challenging the finding bears the burden of showing there is insufficient evidence to support the juvenile court's finding. (*In re Geoffrey G.* (1979) 98 Cal.App.3d 412, 420.) The substantial evidence standard also applies to findings that must be made by clear and convincing evidence. (See *In re Henry V.* (2004) 119 Cal.App.4th 522, 528-529.)

A. The Children Were Properly Detained.

“A section 387 supplemental petition is used to change the placement of a dependent child from the physical custody of a parent to a more restrictive level of court-ordered care. [Citations.] In the jurisdictional phase of a section 387 proceeding, the court determines whether the factual allegations of the supplemental petition are true and whether the previous disposition has been ineffective in protecting the child. [Citations.] If the court finds the allegations are true, it conducts a dispositional hearing to determine whether removing custody is appropriate. [Citations.] A section 387 petition need not allege any new jurisdictional facts, or urge different or additional grounds for dependency because a basis for juvenile court jurisdiction already exists. [Citations.] The only fact necessary to modify a previous placement is that the previous disposition has not been effective in protecting the child.” (*In re T.W.* (2013) 214 Cal.App.4th 1154, 1161; see § 387; Cal. Rules of Court, rule 5.565(e); *In re Joel H.* (1993) 19 Cal.App.4th 1185, 1200.)

Mother argues there is no evidence from which the court could conclude the children were at risk at any time while they were in her care. She relies on testimony of Grandmother and Mother’s therapists. Grandmother testified that she never suspected Mother of drinking while the children were in her care. The therapists similarly testified that Mother never appeared to be under the influence of alcohol, and they had no concerns that the children were in any danger when they were with Mother. All good as far as it goes.

But there was also evidence that Mother had four positive tests for alcohol in July 2018, and her drinking was an ongoing concern that jeopardized her children's safety and well-being. Mother's test of July 5 was positive for ethanol just a day after she was with Grandmother and the children and showed that she would have consumed one to two drinks within four hours of the test. (In fact the test occurred only 45 minutes after she dropped the children off at day camp as shown in the record of the jurisdictional hearing.) The other tests in July revealed Mother drank significantly over the course of the month. But she admitted only to drinking a single beer. Mother also told her caseworker she would enroll in outpatient treatment but had not done so by the time of the detention hearing.

Finally, there was an incident in July when Mother was with her children and called Grandmother looking for a way to get home to Foster City from Redwood City. Mother was described by Grandmother as "acting manic" and "frantic and in the non-stop talking mode." Mother apparently made it home with the children without incident.

On this record we have no difficulty concluding that Mother's case plan was ineffective in preventing Mother from abusing alcohol and thereby putting her children at risk. Mother's initial denial of significant drinking during July, her four positive tests for alcohol consumption, including the July 5 positive test for ethanol just a short time after she was with the children, and the incident in Redwood City all support the findings that detention was warranted. The previous placement with Mother was ineffective in protecting the children.

B. The Order Removing the Children from Mother's Care and Setting the 366.26 Hearing Was Proper.

Mother next contends that, even if there was sufficient evidence to sustain the supplemental petition, there was insufficient evidence to support the order removing the children from her custody. We disagree.

In order to remove a child from parental custody under a section 387 supplemental petition, the juvenile court must make the same findings as those necessary to remove a child from parental custody at the initial disposition hearing under section 361. (*In re*

Javier G. (2006) 137 Cal.App.4th 453, 462.) Thus, before a minor can be removed from the parent's custody, the court must find, by clear and convincing evidence, that there is a “substantial danger to the physical health, safety, protection, or physical or emotional well-being of the minor if the minor were returned home, and there are no reasonable means by which the minor's physical health can be protected without removing the minor from the minor's parents. . . .” (§ 361, subd. (c)(1); *In re Javier G.*, *supra*, at p. 462.) “A removal order is proper if it is based on proof of (1) parental inability to provide proper care for the minor and (2) potential detriment to the minor if he or she remains with the parent. [Citation.] The parent need not be dangerous and the minor need not have been harmed before removal is appropriate.” (*In re T.W.*, *supra*, 214 Cal.App.4th at p. 1163.)

The record here amply supports the required findings. Mother had over 18 months of reunification services before the children were transitioned to her care under the family maintenance plan in April 2018. Yet, she was described to be in only the pre-contemplation phase of her substance abuse treatment and just enrolled in an inpatient program a few weeks before the jurisdictional hearing. On this record, Mother’s testimony that she was not aware she was required to abstain from alcohol at all times demonstrates how early she must be in her recovery. Yet, Mother met with social workers more than 24 times between 2016 and 2018 to discuss her compliance with her case plan, tests results and her recovery.

Mother’s positive test for ethanol on July 5 permits a ready inference that she consumed alcohol while she was with the children just 45 minutes before testing. Moreover, the test results showed Mother consumed a significant amount of alcohol throughout July. This evidence also permits an inference that she drank while the children were in her care. The evidence of Mother’s alcohol use did not demonstrate isolated instances of relapse, but rather increased concentrations of alcohol over time or chronic consumption.

This record supports a finding that Mother was unable to provide the twins proper care and they would be at risk of harm if returned to her custody. By the time of the jurisdictional hearing, Mother had been provided more than two years of services, she

had a poor track record in demonstrating her commitment to sobriety and failed to recognize the seriousness of her addiction. Under the circumstances, the order removing the children from Mother's custody was supported by clear and convincing evidence.

C. The Juvenile Court Correctly Concluded that Mother Made Minimal Progress on Her Case Plan and Exhausted the Time for Reunification Services.

When a case proceeds on a supplemental petition pursuant to section 387, the time clock does not run anew for reunification services. Instead, the availability of additional services is a question of how much time has passed since the case began. Mandatory services are limited to no more than 18 months following the date a child was first removed from parental custody and may only be extended beyond that time in very limited circumstances such as: when no reunification plan was ever developed, reasonable services were not offered, or the best interests of the children would be served by a continuance of an 18-month review hearing. (§§ 361.5, subd. (a), 366.22 subd. (a); *Carolyn R. v. Superior Court* (1995) 41 Cal.App.4th 159, 166-167.) There is no argument any of these exceptions apply in this case.

The twins were originally removed from Mother's care in August 2016. The court correctly concluded that the statutory time for services had run by the time of the jurisdictional hearing in September 2018, and that Mother had made only minimal progress on her case plan. These findings also support the court's conclusion to proceed with a permanency planning hearing under section 366.26.

DISPOSITION

Mother's petition for an extraordinary writ is denied on the merits. (366.26, subd. (l); *In re Julie S.* (1996) 48 Cal.App.4th 988, 990-991.) The stay ordered by this court on October 19, 2018, is dissolved and this matter is remanded to the superior court for further proceedings. Our decision is final immediately. (Cal. Rules of Court, rules 8.452 (i), 8.490 (b).)

Siggins, P.J.

We concur:

Jenkins. J.

Petrou, J.